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ANNUAL REPORT OF THE MONTANA CONSUMER COUNSEL
TO THE MONTANA LEGISLATIVE CONSUMER COMMITTEE
FOR THE YEAR 1973

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The Montana Consumer Counsel herewith and hereby respectfully submits his first annual report pursuant to the provisions of Sec. 7(7) of the Montana Consumer Counsel Act, now codified as R.C.M. 1947, 70-707(7).

CREATION OF OFFICE

The Montana Consumer Counsel is a creature of the Montana Constitution of 1972, which included a mandate to the legislature to provide for such an office to represent consumer interests in hearings before the Montana Public Service Commission or any other successor agency. The constitution provided for funding of the office.

At the first legislative session following the adoption of the proposed Montana Constitution of 1972, the legislature considered alternatives for implementing the constitutional provision, and enacted what is now signed into law as Chapter 65 of the Laws of 1972 as the most acceptable alternative. In so doing, they elected to provide for the office by creating the position but making it answerable to a committee of legislators composed of one member of each major political party in each house of the legislature, which would act as the policy-making body for the agency.

Minimum qualifications for the office were specified and broad discovery powers were delegated. Armed with the new constitution, the Montana Administrative Procedures Act, and the Montana Consumer Counsel Act, a Montana Consumer Counsel, subject to approval of the Legislative Consumer Committee, has authority to proceed through



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the executive branch of state government, the judicial branch of state and federal government, and the legislative branch of state government to defend and advocate the interests of carrier and utility consumers generally of the State of Montana.

IMPLEMENTATION OF OFFICE

Full implementation of the office and staff and full, efficient execution of the functions and powers of the office have not as yet been achieved. The office is still in its formative stages. The position of Consumer Counsel was filled by the hiring of Geoffrey L. Brazier, an attorney from Helena, Montana, who assumed his position on August 1, 1973 and proceeded to hire what he and the committee conceived to be necessary clerical help.

During the first four months in existence, the office was housed in a legislative committee room at the State Capitol Building, but increasing demands by governmental agencies for space and the approach of a convened session of the legislature necessitated an interim move to facilities elsewhere in the city of Helena. It is a stated long-term priority of the Department of Administration that the permanent office of Consumer Counsel ultimately be housed in the State Capitol Building. The Department of Administration has established the completion and occupancy of an additional wing on the Mitchell Building as the point of departure for returning the office of Consumer Counsel to the State Capitol Building, where it will have ready access to the state law library and other governmental resources. For the time being, the Consumer Counsel is renting space at 330 Fuller Avenue, Helena, Montana, sufficient to accommodate three full-time employees and provide modest facilities for conferences.

A priority in the implementation of the office is the identification, hiring, training, and otherwise qualifying for effective contributions of experts in the fields of utility and carrier accounting and rate making, evaluation of physical plants, and returns on investments or costs of money. It is hoped that this position

or positions will be filled by a Montana citizen and every effort is being made to identify such a person.

Under statutory authority, the office has the option of hiring expert help on either salaried bases or as independent contractors. In addition, the Consumer Counsel has identified and contracted for the use of the services of attorneys and accountants practicing in Montana reputed to command expertise in utility, common carrier and related matters. For example, extensive use and reliance upon the services of Mr. William E. O'Leary, of Helena, Montana, who was the attorney for the Public Service Commission for a period of approximately 10 years, has been and is being made. The firm of Artz, Clark & Stevens, C.P.A.'s of Great Falls, was hired to review specified records of the Montana Power Company in a recent proceeding.

ACQUISITION OF CAPITAL EQUIPMENT

During the year 1973, the office made what will probably be its most extensive expenditure for capital equipment.

Equipment and furniture were chosen not only to meet current needs, but with an eye toward the future. For example, typing and dictation equipment selected was such that it was flexible enough to be enhanced by future acquisitions of compatible equipment when the staff is expanded. Dictating equipment is portable in anticipation of possible future demands for extensive travel to attend proceedings of the Public Service Commission and other agencies. The typing equipment is of a nature most commonly used in the legal community and state government. Office furniture and equipment was purchased from state suppliers and selected as medium priced of a style commonly purchased by Montana governmental officials and compatible with both temporary and permanent office facilities. Office equipment included approximately 40 feet of shelf space for professional libraries, in anticipation of the continuing acquisition of a technical library which includes resource material from three major federal agencies and other specialized subjects, not commonly found in the state law library. Naturally, a set of the Montana Codes, which is referred to many times



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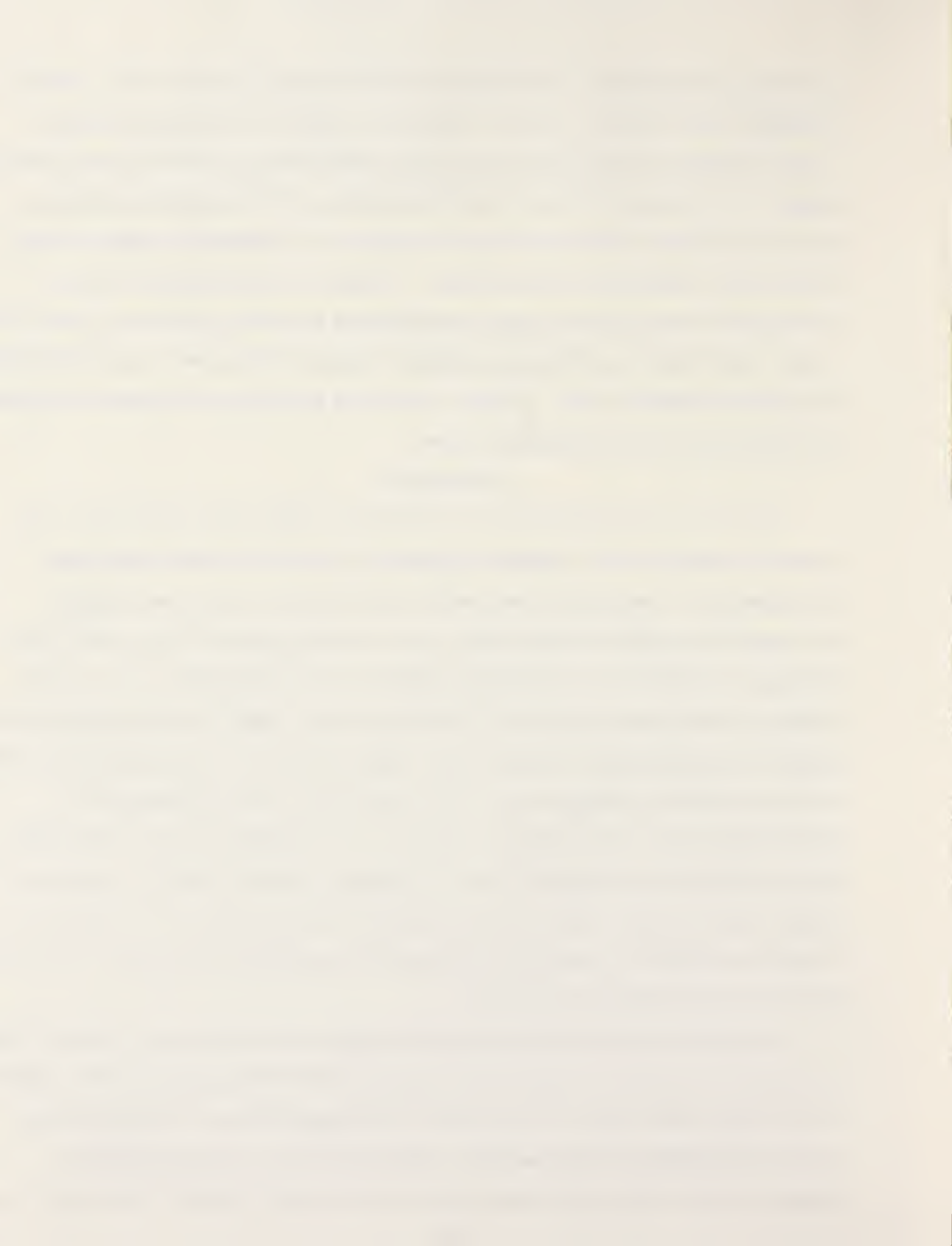
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each day, was purchased in the interest of efficient conservation of time. Office equipment also includes a desk for a secretary, a desk for the Consumer Counsel, a small conference table which can be used by additional personnel while the office occupies its present facility, and sufficient chairs for anticipated conferences. The only additional item of equipment anticipated to be purchased during the first fiscal year of operation is a calculator. Purchase of the calculator is being deferred until the hiring of expert accounting and rate-making personnel is done on a more regular basis, so that such personnel might be afforded the luxury of equipment that they are familiar with. No other substantial purchases of furniture or equipment are anticipated in the foreseeable future.

EXPENDITURES

Functions of the office are to be financed by a fee charged against the gross operating revenues of all companies regulated by the Public Service Commission. This approach to financing is sanctioned by both the constitution and statutes. The legislature appropriated \$80,000 per year for the functions of the office, but neglected to provide for the immediate funding of the appropriation. As a result, although levies against regulated companies have been computed by the Department of Revenue in accordance with the applicable statute, revenues are not anticipated until late in the month of December, 1973. With concurrence with the Department of Administration and the Department of Revenue, it was decided that the office would borrow \$60,000 from the general fund in accordance with other statutory sanctions to finance the functions of the office during the first fiscal year of its existence, it being recognized as a statutory obligation of the office to repay the loan during the fiscal year in which it was made.

In order to most effectively assure that there will be sufficient funds derived to repay the loan and to finance the functions of the office during the first quarter of the second fiscal year of the biennium, the Consumer Counsel informally agreed with the suggestion of the Department of Administration and the Department of Revenue to try to limit expenditures of the office during the first fiscal year to



\$60,000. In spite of the necessity of making substantial expenditures for furniture and equipment and paying increased rent necessitated by occupation of privately-owned facilities, it appears that this objective can be achieved. Advantages were derived from the late implementation of the office and the lag in hiring certain personnel.

As of November 30, 1973, the office had expended or encumbered a total of \$8,078.96 for salaries and contracted services, \$592.86 for travel of legislative Consumer Committee members, and \$4,931.31 for furniture and equipment, constituting a total expenditure for the first five months of the fiscal year and the first four months of the operation of the office of \$13,603.13. Limited experience suggests that monthly expenditures for the balance of the fiscal year ought to be in the neighborhood of \$4,000. Variables are the unanticipated necessity for hiring expert personnel in individual cases and the forthcoming legislative session during which the Public Service Commission normally does not travel, and during which most litigation is customarily held in abeyance.

Future needs are difficult to anticipate at this time. They will no doubt be dictated by what success, if any, the office has in hiring on regular bases the services of experts and the incidence of major administrative hearings and litigation of important consumer issues.

CONSUMER REFERRALS

The title of the office is "Consumer Counsel". It is taken from language in the constitution. At first blush, it would appear that the functions of the office include attending to a much broader scope of consumer affairs than is actually the case. This circumstance has lead to the receipt by the office of 15 known letters and 18 calls complaining of problems which the office is not authorized to handle. Compiling of such statistics began after several months in operation, when it became apparent that a substantial amount of the time of the staff would be dedicated to handling such matters. Some thought has been given to the merits of proposing a change in the title of the office, but the notion has been rejected because it appears

that a constitutional amendment would be required.

As a result of a variety of consumer complaints, the office has developed an efficient referral system to sister agencies of the state and federal government and an efficient reciprocal line of communication with those sister agencies. The joint effort of consumer-oriented agencies is efficient service and handling of meritorious consumer complaints with a minimum of referrals and buckpassing. All involved are confident that a constructive combined force is evolving.

With respect to matters which are the subject of consumer-type complaints that the office does have authority to handle or to look into, the most common is with respect to indifferent or non-existent claim service by carriers, particularly motor carriers. A number of informal remedies have been considered or experimented with, with various degrees of success. It was learned that the Public Service Commission has brought pressure to bear upon certificated carriers to remedy isolated cases. Most cases involve dollar amounts so small as to be prohibitive with respect to pursuing formal judicial remedies.

The situation did inspire the office of Consumer Counsel to explore and pursue several possible legislative remedies. Proceeding under authority delegated by Sec. 7(4) of the Consumer Counsel Act, the Counsel called to the attention of the Legislative Consumer Committee matters which, in his opinion, merited remedial legislation. As a result, a bill for the purpose of stimulating speedier handling of claims was drafted and prefiled for consideration by the 1974 legislative session. In addition, the Counsel and Committee are monitoring pending bills intended to implement the new constitution with respect to Montana's inferior court system and to enhance the state's justice and small claims court services.

LITIGATION

Since implementing the office, the Consumer Counsel has monitored all pending court cases involving the Public Service Commission and has been involved in one formal court action. With respect to cases involving the Commission, it was learned that there were three such cases, including one involving private advisaries and one

based upon previous supreme court decisions over which the Consumer Counsel had no control. The third case was later dismissed by the litigents.

The experience did bring to light the fact that the Consumer Counsel Act in its present form does not clearly delegate authority to the Counsel to intervene or otherwise participate in court cases which he does not initiate or to which he is not made a party by the complaining party. Remedial legislation making clear the authority of the Consumer Counsel to intervene and otherwise participate in matters of interest to carriers and utility consumers in Montana is being proposed.

A case against the Consumer Counsel was brought by the Public Service Commission after the Counsel, as part of the preliminary proceedings at his first administrative hearing, objected to the taking of evidence because of inadequacy of notice. The direct result of the objection was that the applicant for relief from the Public Service Commission dismissed his case and the commission cancelled its hearing docket for the ensuing two months. The commission thereafter asked the supreme court to rule on the merits of the Consumer Counsel's objection. The supreme court declined to accept jurisdiction or review the case and limited its ruling to a perfunctory order denying relief. No comment upon the substantive law was forthcoming. However, it is felt by close observers that the case did serve to underscore the desirability of involving the consuming public in matters which come before the Public Service Commission, because they are, after all, matters of public interest.

Both the commission and the Consumer Counsel are considering alternative forms of legislation to broaden the scope of the notice-giving procedure to direct the attention of interested members of the consuming public to the availability of the services of the office of the Consumer Counsel. The underlying purpose of broader notice and involvement is to assure that the Consumer Counsel's actions reflect the thinking of the consuming public involved instead of dictating what that interest might be.

Close observers also agree that the litigation served to underscore the fact that the administrative level hearing provides a forum for the raising of issues by interested persons, with those issues to be disposed of through normal democratic institutions, particularly the distillation process of adjudication. That is, the parties make a record for appeal by raising issues at the administrative level. If they are aggrieved by the resulting ruling, they ground their appeals on alleged erroneous rulings on such issues as they feel are relevant and have merit. The courts deliberate upon the merits of the issues raised and put an end to the controversy by their decisions.

ADMINISTRATIVE HEARINGS

Since the implementation of the office, the Consumer Counsel has attended two meetings of the Legislative Consumer Committee, one hearing of the Interstate Commerce Commission, and 14 hearings of the Public Service Commission. In addition, he has participated in one court case, monitored three court cases, monitored one Interstate Commerce Commission hearing, participated in two Public Service Commission proceedings which did not go through the complete hearing stage, and made written appearances in four Public Service Commission proceedings now pending.

The thrust of the Interstate Commerce Commission participation was an effort to preserve jurisdiction over rates for certain commodities in agencies of the State of Montana and to avoid having those matters appropriated to paramount federal jurisdiction. One Interstate Commerce Commission participation was essentially an exercise in futility, because it involved a proceeding dictated by Congress to guarantee a passthrough of increased retirement benefits for railroad employees. Paramount federal jurisdiction was again involved.

The great majority of the hearings had before the Public Service Commission were with respect to granting or broadening the scope of authority of certain motor carriers to transport certain commodities or provide certain services in intrastate service. For the most part, it was the impression of the Consumer Counsel that

there were no substantial public concerns hanging in the balance.

Although a certain amount of experience with this type of hearing is essential to the Consumer Counsel having a complete grasp of the functions of the Public Service Commission, it appears questionable that he be obliged to attend and physically participate in all matters that come for hearing before the Public Service Commission as mandated by Sec. 7(1) of the Consumer Counsel Act in its present form. This becomes more questionable when one contemplates the likelihood of major utility rate increase applications being made in the near future. Unless the Consumer Counsel has some discretion in establishing priorities, his effectiveness may be substantially dilluted by distractions in attending to matters relatively less significant.

A realistic number of participations in Public Service Commission hearings are necessary to gain some insight regarding practice and procedure in hearings conducted by it and possibly to inspire some constructive suggestions how they might be handled more efficiently with respect to use of the time and resources of the commission and with respect to the guaranteeing to the consuming public of its rights to know and to participate. Items of continual concern apparently to both the Commission and the Counsel are to find an effective and efficient way to alert the public in affected localities where motor carrier authority is under consideration and to stimulate members of the consuming public to make their interests and concerns known to the commission through the Consumer Counsel. It appears likely that a number of legislative experiments will be suggested over the years.

In motor carrier authority matters having implications to broader segments of the public, formal written appearances have been filed, raising a number of important substantive and procedural issues. It is not intended that each case be appealed to a court of law. At the outset, and even with the assistance of knowledgable help, the Consumer Counsel, in his formative years, in no way can be aware enough to be efficiently selective regarding what cases and what issues should be tried at any particular time. Better practice suggests that, when in doubt, issues should be raised at the earliest opportunity, participation should be vigorous at the admin-

istrative level, the administrative final order should be thoroughly analyzed with respect to the implications to the public, and certain substantive issues should then be litigated in appropriate cases where the public is truly aggrieved.

The availability of the judicial remedy for raising and testing issues should make the office of Consumer Counsel an effective tool on behalf of the consuming public, if it does not take a "meat-ax" approach to all matters coming before the Public Service Commission and federal agencies. Laws can be tested, interpreted and applied through the judicial branch of government, and the experience can stimulate remedial legislation. Experiences at the administrative level can stimulate remedial legislation. The Consumer Counsel, in appropriate cases, can take the initiative and make applications for relief on behalf of consumers at the administrative level.

REMEDIAL LEGISLATION

Under the provisions of Sec. 7(4) of the Act, the Consumer Counsel has authority to recommend to the Legislative Consumer Committee remedial legislation. Presumably the legislation should be limited in scope to problems involving carrier and utility consumers and substantive and procedural matters involving the Public Service Commission. Presumably also, the Legislative Consumer Committee is intended to evaluate the recommendations of the Consumer Counsel and superimpose their collective wisdom and experience over the recommendations, with the result being that the more meritorious recommendations will be submitted to the legislature proper for its consideration. Some suggestions will no doubt be rejected out of hand by the Legislative Consumer Committee.

In view of the broad scope and controversial nature of the subject matter, there have been no end of suggestions for remedial legislation volunteered. Some ideas come to mind independently.

The office will have been in its formative stages for five months when the legislature convenes. It will not be fully operational. It will have experienced a limited number of involvements. Suggested remedial legislation for the 1974 session

has, therefore, been kept to a minimum, with emphasis being placed upon housekeeping measures with respect to the Consumer Counsel Act.

The housekeeping measures will be incorporated in one bill and will be aimed at clarifying procedural authority that the Consumer Counsel has to act on behalf of the consuming public. For example, the proposed legislation will be intended to make it clear that the Consumer Counsel has authority to appear before federal agencies which have jurisdiction over matters of concern to the utility and carrier consuming public of Montana, to make clear that the Consumer Counsel has authority to intervene in court cases between other parties on matters of concern to the consumers of Montana, to authorize the Consumer Counsel to bring or participate in court cases involving transportation and utility consumer concerns where administrative agencies are not otherwise involved, and to clarify the discovery power of the Consumer Counsel with respect to matters not pending. In addition, the proposed legislation would authorize the Legislative Consumer Committee to meet more often than once every three months in order that it might be able to monitor the activities of the Consumer Counsel in a more effective manner. Proposed legislation would also ease the burden of the Consumer Counsel which is presently to appear at all proceedings conducted by the Public Service Commission. This would permit the Counsel to be more selective as to his priorities and place more emphasis on major matters. It is not intended that the Counsel be relieved of the duty to monitor all proceedings and evaluate them. Internal procedures are already being formulated toward this purpose.

Additional proposed remedial legislation is based upon the experience of the Consumer Counsel to date. One such proposal will be to provide broader public notice of hearings before the Public Service Commission and advertise the existence of the Consumer Counsel as an agency available to render service on behalf of the consuming public.

Another item of proposed remedial legislation is one intended to stimulate faster and fairer handling of claims by carriers. The bill is intended to proscribe

settlements and authorize the award of punitive damages when a valid claim has not been paid within six months after it has been filed with the carrier. It is recognized that this proposed bill can not constitute a universal form of relief, because the majority of transactions are in interstate commerce and governed by paramount federal law. It is hoped, however, that one or two hard experiences by carriers under the proposed remedial legislation will have the desired effect. The Committee recognizes pending bills aimed at establishing small claims courts and otherwise enhancing our state's inferior court system so that persons with small claims will be able to take their cases to trained judicial personnel without the necessity of assistance of an attorney, thereby securing full legal redress for small claims.

In addition to the above, the Legislative Consumer Committee has approved as remedial legislation, a bill to make clear that sewerage services are utilities within the scope of the laws governing such subjects, and that rates charged for such services must have the approval of the Public Service Commission as do other utility services.

STRUCTURE AND POSTURE OF LEGISLATIVE CONSUMER COMMITTEE

The Legislative Consumer Committee is made up of one Republican and one Democrat from each house of the legislature. Its members include Senator Gordon E. Bollinger, Democrat from Glasgow, Chairman; Senator Herbert J. Klindt, Republican from Billings; Representative Joe Quilici, Democrat from Butte; and Representative James P. Lucas, Republican from Miles City. The members are grounded in business, education, agriculture, labor and the law. It is their stated collective purpose to officially carry out the intentions of the constitution and the statutes without prejudice or bias.

In cases in controversy, it is their intention to determine and establish as clearly as possible all relevant facts and to proceed according to established procedural and substantive law in an orderly manner to make certain that carrier and utility services are made available to the consuming public in the most efficient

manner. Input provided in advisory proceedings by the Consumer Counsel will be aimed at a full, fair disclosure of all relevant facts. Input provided to other democratic institutions is intended to be aimed at maintaining and enhancing order and consistency in the rate-making process and protecting the consuming public from abuses.

A professional posture will be maintained at all times. The Consumer Counsel, as part of his qualifications, must be an attorney, and is therefore circumscribed by the canons of ethics with respect to public comment on matters pending on both administrative and court procedures.

